

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 14 10 46 AM '95

MM Docket No. 93-135

DISPATCHED BY

In re Applications of

THE PETROLEUM V.
NASBY CORPORATION

File No. BRH-890601VB

For Renewal of License
of Station WSWR(FM)
Shelby, OhioTHE PETROLEUM V.
NASBY CORPORATIONFile Nos. BTCH-921019HX
and BTCH-921019HYFor Transfer of Control of
Station WSWR(FM)
Shelby, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1995; Released: September 13, 1995

By the Review Board: MARINO (Chairman) and
GREENE.

Board Member GREENE:

1. In a *Decision* in this proceeding, FCC 95R-11, released June 5, 1995, the Review Board granted the license renewal application of The Petroleum V. Nasby Corporation for Station WSWR(FM) and granted the licensee's application for *nunc pro tunc* approval of transfer of control of the station. These actions were conditioned upon specific divestiture provisions relating to present and future stock ownership and corporate management of the licensee. We now have before us a petition for reconsideration and/or clarification filed July 5, 1995 by Nasby, as well as an opposition filed July 19 by the Mass Media Bureau,¹ and a reply filed July 31 by Nasby. Nasby's petition relates solely to the aforementioned divestiture provisions.

2. In its *Decision* the Board held that the criminal convictions of Thomas L. Root, Nasby's former corporate secretary, director, major stockholder, and legal counsel, did not require denial of its license renewal application because Mr. Root's illegal activities were apparently unknown to the other Nasby principals who were uninvolved in any of the incidents of Mr. Root's adjudicated misconduct, and Mr. Root was not in charge of the day to day operation and

management of the station. We also affirmed the ALJ's holding that although Mr. Root and his wife, Kathy G. Root, had engaged in an unauthorized transfer of control of the station, in the absence of a record of accompanying concealment, renewal of license would not be denied on this basis either. Nevertheless, in view of the unsettling if not unprecedented circumstances presented, namely, that the wrongdoer, Mr. Root, had terminated his controlling interest in the licensee by transferring his ownership to the members of his immediate family, including his wife, his children, and his parents, we directed that these interests be divested to unrelated parties within sixty days. We applied the same condition to the corporate positions of secretary and director assumed by Mr. Root's mother subsequent to her son's resignation from the station. In ordering these divestitures, we were specifically concerned that the station not be subject in the future to the taint of Mr. Root's influence.

3. In its petition, Nasby first seeks clarification of that aspect of our divestiture directive that requires Nasby to carry out the proposed transfer of 70.25 shares owned by Mr. Root's parents to the law firm of Ginsburg, Feldman & Bress in payment of legal fees incurred in representing Root. Nasby seeks assurance that the proposed transfer satisfies our condition that the stock be divested to "unrelated buyers." In the body of our *Decision*, at para. 24, the Board included these shares as part of the "Root family holdings involved in the unauthorized transfers of control" that were to be divested to unrelated third parties, and the ordering clause, para. 25, granted the transfer of control application specifically covering these shares. Thus, the proposed stock transfer to Ginsburg, Feldman & Bress would satisfy the Board's requirement contained in the ultimate ordering clause, para. 26, that the stock be divested to unrelated parties.

4. Next, Nasby seeks reconsideration of the condition requiring divestiture of the 33 shares Kathy G. Root owns individually, the 50 shares she holds as custodian for her children, and the 100 shares owned by the Root children through a trustee. Nasby contends that the divestiture imposes an undue hardship on it because WSWR(FM) is a 3 kw station whose operation is marginal, the station is not in a financial position to purchase the stock, there is no secondary market to sell less than a controlling interest in a station of its size, and 60 days is not sufficient time within which to find a purchaser. As an alternative to divestiture, Nasby proposes that the Board permit it to establish a new trust to hold title to the shares now owned by Kathy G. Root and her children. As contemplated by Nasby, such a trust would be administered by an independent trustee unrelated to members of the Root family and would be irrevocable. The principal features of the proposed trust arrangement would include the following: (a) the trustee would have sole voting control over the shares held for the benefit of Kathy G. Root and her children; (b) no beneficiary or other person would be empowered to replace the trustee or direct him in the discharge of his duties; (c) the trustee would be prohibited from selling the

¹ Other than arguing that Nasby's petition does not satisfy the criteria required for reconsideration in that it does not point out any material errors or omissions in the Board's *Decision*, the Bureau offers no substantive response to Nasby's pleading. It does contend, however, that Nasby's renewal application should be denied for the reasons stated in its Application for Review

filed with the Commission on July 5, 1995, a copy of which is attached to its opposition. We will not address again the Bureau's position, which was considered fully in our *Decision*. See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

stock to any beneficiary or other member of the Root family; (d) the trustee would be prohibited from providing any beneficiary with any information relating to the operation, management, or financial condition of Nasby; and (e) the trustee could select a replacement trustee without participation or consultation with any member of the immediate Root family. Moreover, Nasby asserts, the trust arrangement would otherwise comply with the Commission's attribution policies regarding voting trusts, citing *Corporate Ownership Reporting and Disclosure by Broadcast Licensee*, 97 FCC 2d 997, 1023-24 (1984), *recon. granted in part*, 58 R.R. 2d 604 (1985). This arrangement, Nasby submits, would address the Board's concern that any potential presence of Thomas L. Root be removed and would allow for a transfer of the stock at a later date in an orderly fashion.

5. The Board will decline Nasby's invitation to accept its proposed trust arrangement in lieu of the stock divestitures ordered herein. In our *Decision*, we recited the unusual circumstances of Mr. Root's departure from Nasby which at bottom did not amount to a clean break from the station but involved a series of stock transfers of his considerable ownership interest to the members of his immediate family. These transactions, cumulatively, amounted to an unauthorized transfer of station control, and Mr. Root's wife, Kathy G. Root, who would be a beneficiary of the proposed trust arrangement, participated in the transfer. In addition, Mr. Root's mother, Joanne Root, who, together with her husband, received 70.25 of the subject shares of stock, also succeeded her son to membership on Nasby's three member board of directors and as corporate secretary. While we affirmed the ALJ's holding that, in the absence of accompanying misrepresentation, the unauthorized transfer of control in this case does not require denial of renewal, this did not mean that the Commission is powerless to fashion an appropriate sanction in accordance with the facts of record. *See Deer Lodge Broadcasting, Inc.*, 86 FCC 2d 1066 (1981) (illegal transfer of control unaccompanied by concealment results in short-term renewal). In our view, divestiture of those interests involved in the unauthorized transfer to unrelated third parties is the most suitable means of providing WSWR(FM) with an independent future untainted by its unfortunate association with Mr. Root.

6. While we will not accept Nasby's proposal as an alternative to divestiture, nevertheless, we will allow its trust arrangement for an interim period of six months in lieu of ordering divestiture within sixty days of the stock owned by Mrs. Root and her children. We do so, notwithstanding Nasby's failure to provide specific support for its bare assertions, because we take Nasby's point that the sale of these shares in a small market station would be very difficult to achieve in the near term. We believe a six month period should be adequate time to locate unrelated buyers for the stock. If it is not, and if need be, the shares can be transferred at the end of six months to the corporate treasury and held there until buyers can be found. In the interim, we are satisfied that the contemplated trust arrangement, as described by Nasby, comports with the Commission's attribution standards for voting trusts and contains adequate safeguards for the independent control and voting of these shares so that they will not be subject to the prospective presence of Mr. Root. As suggested by Nasby, and pursuant to our *Decision*, at note 12, the specific trust terms should be submitted as an addendum to the transfer of control application governing the subject

shares, and the amendment as well as all processing questions and other inquiries regarding implementation of the arrangement should be directed to the appropriate officials of the Mass Media Bureau.

7. Finally, Nasby requests that the Board reconsider its directive ordering Mr. Root's mother, Joanne Root, to relinquish her corporate positions as officer and director. Nasby argues that this condition is overly harsh in that Joanne Root has been a Nasby stockholder for twelve years and was duly elected to her corporate roles. We will not reconsider this aspect of the divestiture order. While it may be true that Joanne Root has been associated with the licensee for some time, it is equally true that she became Nasby's corporate secretary and one of its three corporate directors only following her son's resignation from these positions. Moreover, unlike the proposed trust arrangement discussed earlier, which is designed to remove the possibility that Mr. Root could influence the voting of the shares in question, Joanne Root has active and significant corporate leadership roles which cannot be insulated in the same way.

8. ACCORDINGLY, IT IS ORDERED That the petition for reconsideration and/or clarification, filed July 6, 1995, by The Petroleum V. Nasby Corporation, IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board